

1 Witnesses were sworn and testified. Exhibits were examined. From
2 the testimony heard and exhibits examined, the Board makes these

3 FINDINGS OF FACT

4 I

5 Respondent DOE is a state agency with responsibility for
6 conducting a program of air pollution prevention and control pursuant
7 to the Washington Clean Air Act, chapter 70.94 RCW, in Stevens County,
8 the site of the events at issue in this case.

9 II

10 Appellant Gary Cummings is a resident of Springdale, Washington.
11 He owns and operates a cafe in Springdale. In February of 1985, Mr.
12 Cumming's cafe, located in a building almost a century old,
13 experienced a fire and was totally destroyed. He hired a crew to tear
14 the remains down and salvage those items that could be sold. The
15 remainder of the debris was then pushed into a pile. The pile did
16 contain prohibited materials such as plastic pipe, linoleum and tar
17 paper. The pile was about 20 feet in diameter and eight feet high.

18 III

19 On April 5, 1985, Mr. Cummings contacted the DOE to determine how
20 he might dispose of the pile of debris. On April 9, 1985, the DOE
21 inspector observed the pile. He later informed Mr. Cummings that if
22 he wanted to burn the debris, he would need to separate the prohibited
23 material from the pile and apply for a permit to burn the remainder.
24 Alternatively he could haul the entire pile to a sanitary landfill.
25 Mr. Cummings testified that he then started to separate the prohibited

26 Final Findings of Fact,
27 Conclusions of Law & Order
 PCHB No. 85-89

1 materials from the pile. However, he did not complete this job. Nor
2 did he obtain a commercial open burning permit.

3 IV

4 On Saturday, April 13, 1985, after debris had been sitting there
5 about three weeks, the pile was set on fire by unknown causes. All of
6 the prohibited materials had not yet been removed from the pile. Mr.
7 Cummings had travelled out of the area and thus was not in Springdale
8 at the time of the fire. The fire started about 4:30 p.m. The local
9 fire district responded and when the fire truck arrived, the fire was
10 burning vigorously and very hot. Flames about four feet high were
11 shooting up out of the middle of the pile. It appeared that the blaze
12 was centered inside the stack near the bottom of it. A fireman
13 testified that the fire burned like fuel was in it and that there was
14 a smell like diesel oil. By about 7:30 p.m., the fire district had
15 the major portion of the fire extinguished.

16 However, the pile did smolder for about a week after the fire
17 started. Testimony of two citizens indicated that the fire caused
18 dense smoke and odors which were objectionable to them.

19 Mr. Cummings arrived back in Springdale on the morning of April
20 14, 1985. He was surprised to see what had happened. He did not, as
21 one witness thought, thereafter add any more material to the fire.
22 Yet, there is no evidence that Cummings or anyone else attempted to
23 foreshorten the long period of smoldering.

24 V

25 DOE, after evaluating the fire department's report, issued DE

26 Final Findings of Fact,
27 Conclusions of Law & Order
PCHB No. 85-89

1 85-371, Notice of Penalty Incurred and Due, asserting a violation o
2 WAC 173-425-045 and WAC 173-425-075(2) under the provisions of RCW
3 70.94.431(1). The Notice assessed two civil penalties of \$1,000 each.

4 No one from DOE visited the site in the aftermath of the fire to
5 investigate the facts and circumstances of the event. When the
6 penalties were issued, the agency was apparently unaware of Mr.
7 Cummings' absence at the time the fire began.

8 Mr. Cummings timely appealed by letter received by this Board on
9 May 23, 1985.

10 VII

11 DOE's inspector testified that the maximum penalty was assessed
12 because the burning was, in his view, a clear violation of the act
13 (Clean Air Act) after the appellant had been told that he could not
14 burn the pile without getting a permit and separating the prohibited
15 materials from the pile. His supervisor in the Department approved
16 the maximum penalties.

17 Mr. Cummings has no record of prior violations.

18 VIII

19 Mr. Cummings neither started the fire nor instructed anyone to
20 start it. Before he left town on April 13, he contacted a neighbor
21 and asked him to keep an eye on the pile. He did so because he feared
22 that a fire might be started.

23 The neighbor testified that he did check the scene periodically.
24 It was he who initially reported the fire to the fire district.
25 However, he did not see how it started. He did note that some

26 Final Findings of Fact,
27 Conclusions of Law & Order
PCHB No. 85-89

1 materials on the scene were not from the old cafe and appeared to have
2 been dumped there by outsiders.

3 IX

4 Exactly how the fire started remains unknown. Its location and
5 character seem to rule out stray sparks from the fire district's clean
6 up burning on vacant lots elsewhere in town.

7 But the debris pile was outdoors, in the open, readily accessible
8 to anyone who might wander by. Those testifying believe that the fire
9 was deliberately ignited by a trespasser.

10 X

11 Any Conclusion of Law which is deemed a Finding of Fact is hereby
12 adopted as such.

13 From these Findings of Fact the Board comes to these

14 CONCLUSIONS OF LAW

15 I

16 The Board has jurisdiction over the issues and parties. Chapters
17 43.21B and 70.94 RCW.

18 II

19 WAC 173-425-045 entitled "Prohibited Materials" reads in pertinent
20 part, as follows:

21 . . . [T]he following materials shall not be burned
22 in any open fire:

- 23 (1) Garbage;
- 24 (2) Dead animals;
- 25 (3) Asphaltic products;
- 26 (4) Waste petroleum products;
- 27 (5) Paints;
- (6) Rubber products;
- (7) Plastics;

(8) Any substance, other than natural vegetation, which normally emits dense smoke or obnoxious odors.

III

The fire in question, if authorized, would have been "commercial open burning." WAC 173-425-030(2).

WAC 173-425-075 entitled "Commercial Open Burning" states, in pertinent part:

(1) No permit shall be issued for commercial open burning, and commercial open burning shall not be conducted:

(c) If the burning contains prohibited materials, as provided in WAC 173-425-045.

(2) No commercial open burning shall be conducted without authorization from the department. Open burning shall be authorized only if:

(a) The applicant shows that no approved practical alternate method of disposal is reasonably available; and

(b) The applicant shows that burning, as requested, is reasonably necessary to successfully carry out the enterprise the applicant is engaged in; and

(c) The burning will not violate any regulations of a local fire protection agency authorized to issue burning permits, to prevent or abate nuisances, or any local county or city ordinance or resolution pertaining to a nuisance.

III

We conclude that the fire on Mr. Cumming's property April 13, 1985, violated both WAC 173-425-045 and WAC 173-425-075. The fire

Final Findings of Fact,
Conclusions of Law & Order
PCHB No. 85-89

1 contained prohibited materials which had not yet been separated from
2 the pile and which cannot be burned in an open fire. No permit was
3 obtained to burn those materials present which are not on the
4 prohibited materials list.

5 IV

6 The Clean Air Act is a strict liability statute and, therefore,
7 the violator's state of mind or intentions are irrelevant to the
8 question of liability for penalties under its authority. However,
9 such matters can be relevant to the issue of how much the penalty
10 should be in any case.

11 V

12 Property owners are prima facie responsible for unlawful fires
13 involving their property. Such owners can, however, be absolved of
14 responsibility by showing that neither their actions nor their
15 ownership are so connected with the unlawful event as to have
16 "allowed" it. Sprague v. SWAPCA, PCHB 85-69 (October 14, 1985).

17 VI

18 Normally a property owner is held responsible for unlawful fires
19 started by trespassers, spontaneous combustion, or unknown causes.
20 Davenport v. DOE, PCHB 79-208 (April 24, 1980); Cathlamet v. SWAPCA,
21 PCHB 78-249 (June 29, 1979). This, however, is not because the
22 property owner is the only person available to charge. It is rather
23 because in the usual case, the property owner created a substantial
24 risk that an unauthorized fire would occur. Property owners who leave
25 unattended piles of burnable debris in circumstances which can be said

26 Final Findings of Fact,
27 Conclusions of Law & Order
PCHB No. 85-89

1 to invite a fire to be started, are held to have "allowed" such fire.
2 as are started. See Kneeland v. OAPCA, PCHB 778 (July 17, 1975);
3 Terry's Thriftway v. PSAPCA, PCHB 85 (July 12, 1972).

4 VII

5 Here, appellant correctly feared a fire might be started and took
6 some precautions by asking his neighbor to keep a watch. This proved
7 to be too little in light of the risk which appellant created. The
8 debris pile was left in place for several weeks. Access to it was not
9 impeded. No "keep out" signs were posted. Others apparently were
10 beginning to use it as a dump.

11 Under all the circumstances, we conclude that it is proper to hold
12 appellant legally responsible for "allowing" the fire which occurred.

13 VIII

14 RCW 70.94.431(1) authorizes the imposition of a civil penalty for
15 violation of the Clean Air Act or its implementing regulations. The
16 penalty shall be "in the form of a fine in an amount not to exceed one
17 thousand dollars per day for each violation." The term "not to
18 exceed" necessarily implies the use of judgment in determining how
19 much the penalty should be in any instance.

20 The statute sets no explicit standards, but implicit in the
21 penalizing function is an individualized consideration focusing on the
22 seriousness of the violation and the behavior of the violator. The
23 review procedures available before this Board provide a procedural
24 safeguard against arbitrary action in penalty setting, Glascam
25 Builders v. Yakima County Clean Air Authority, 85 Wn.2d 255, 534 P.2d

26 Final Findings of Fact,
27 Conclusions of Law & Order
PCHB No. 85-89

1 33 (1975), but the initial assignment of penalty by the agency should
2 reflect a consideration of the circumstances and an attempt to select
3 the level of sanction appropriate to the particular case.

4 DOE's lack of follow-up investigation in this instance has
5 resulted in penalties which we conclude are excessive.

6 IX

7 Appellant intended to haul the prohibited material away and seek a
8 permit to burn what was left. Events overtook the project, but the
9 violations were not the flagrant flouting of the rules which
10 Department of Ecology supposed. They were the result of a
11 miscalculation of risks, not of calculated law breaking.

12 Not only has appellant no record of prior violations, but it is
13 unlikely that circumstances like those which produced the fire in
14 question will occur again. He is not in a business which routinely
15 involves burning.

16 The purpose of the civil penalty is not primarily punitive, but
17 rather to influence behavior. Under the facts before us, we do not
18 believe this objective is served by assessing two penalties for
19 separate violations. The conduct which led to the two infractions is
20 identical. It is happenstance that the unintended fire resulted in
21 the violation of more than one regulation.

22 Moreover, the assessment of even one penalty at the \$1,000 maximum
23 under the section cited, is on this record more than required to meet
24 the objects of specific deterrence. The need to promote compliance
25 among members of the public generally, however, supports

26 Final Findings of Fact,
27 Conclusions of Law & Order
PCHB No. 85-89

1 the imposition of a monetary sanction. We conclude that the Order set
2 forth below is appropriate.

3 X

4 Any Finding of Fact which is deemed a Conclusion of Law is hereby
5 adopted as such.

6 From these Conclusions of Law the Board enters this
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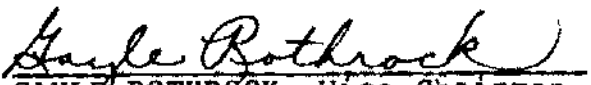
ORDER


The Notice of Penalty incurred and Due (DE 85-37) is affirmed, but \$1,750 of the penalties are vacated. A penalty of \$250 is affirmed.

DONE this 15th day of November, 1985.

POLLUTION CONTROL HEARINGS BOARD

 11/14/85
LAWRENCE J. FAULK, Chairman


GAYLE ROTHROCK, Vice Chairman


WICK DUFFORD, Lawyer Member